United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1355

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In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

RICHARD JOSEPH TODARO,

Appellant.

Appeal from the United States District Court
for the Western District of New York

APPELLANT'S REPLY BRIEF

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INSUFFICIENCY OF EVIDENCE POINT

Subsequent to the filing of appellant's brief, counsel discovered United States v. McCoy, 539 F.2d 1050 (5th Cir. 1976), a case on all fours with that of Richard Todaro. Appellant was convicted for placing a total of a mere ten telephone calls in which he recited the basketball line; he is no bookmaker. In McCoy, the Fifth Circuit began its inquiry by stating the issue, which is also that of our case:

> "The first question, not previously addressed by the federal appellate courts, is whether the exchange of line information alone can suffice to show that one bookmaker is participating in the operation of another bookmaker" (539 F.2d at 1051; emphasis supplied).

The court continued in its analysis by pointing out, as did Judge Curtin (Appellant's Brief, n. at 8) that newspapers very often supply the point spread:

> "We begin with the common sense observation that not everyone who . . . transmits line information to a bookmaker is guilty of a §1955 violation. A newspaper, for example, might innocently report a line being used by Las Vegas gamblers" (Id.).

In McCoy, all the appellants were bookmakers or working for bookmakers in Mobile, Alabama. There were three bookmaking operations, one conducted by the McCoys and a Chastang, one conducted by Bell (the individual in whose activity we are interested), and one by Vaughn. The issue was whether five persons were involved as required by the statute. After reviewing the evidence, the court found that the jury could reasonably conclude that the two McCoys, Chastang, the McCoys' subagent, and Vaughn were all part of the same bookmaking enterprise. With respect to bookmaker Bell, the court was of the opinion that:

> "A difficult question, however, is whether (he) was sufficiently connected to the McCoy bookmaking operation to be considered one of its members. Whitcomb could not testify that Bell had made or accepted any lay-offs with any of the other bookmakers. There was ample evidence that Bell discussed line information with the McCoy operation and that he received line information from Vaughn" (539 F.2d at 1061).

Bell's activities are somewhat similar to those of appellant - transmitting line information, no lay-off betting. Yet, unlike Bell, appellant merely relayed point spreads on isolated occasions; he never received line

information from anyone and more importantly, he was not a bookmaker. Bell "was a bookmaker of some size in the Mobile area" (Id.). Appellant had no financial or supervisory stake in either of the Castellani books. In contrast, "Bell was important enough to McCoy's operation for McCoy to treat him more or less as an equal in the bookmaking business" (539 F.2d at 1062). The court continued in its examination of the Bell/McCoy contacts:

> "Outside of that evidence, however, the only Bell/McCoy direct connections in evidence are four conversations between Bell and McCoy or one of his cohorts concerning the line. There is no evidence showing the importance of such conversations to McCoy or showing a 'constant exchange of line information'". . . (Id.).

There were only ten telephone conversations between appellant, a mere supplier of the line, and the admitted bookmakers. The Fifth Circuit found that four contacts between Bell, a bookmaker, and a second gambling enterprise were insufficient to require that he be counted as a participant. The question becomes "how many calls does it take to make one a conductor?" Although there is no prescribed number of calls whereby a nonparticipant becomes a conductor, by any test that this or any court

should care to adopt, ten telephone calls, when considered in light of all the evidence in appellant's case, is clearly an insufficient basis upon which to sustain a conviction. It must be remembered that appellant's information was easily obtainable by other means and that the bookmakers often did not even use that which appellant had given them. Therefore, appellant's behavior did not substantially affect the Castellani books. Under these circumstances, McCoy requires that the judgment be reversed and the indictment dismissed.

Respectfully submitted,

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